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NO. 82-486

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

BILL MOORE, ET AL,
Defendants-Petitioners,

v.

PAUL E. SCOTT, ET AL,
Plaintiffs-Respondents.

Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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QUESTIONS PRESENTED

1. Whether the court below erred in holding that 42 U.S.C. § 1985(3) provides a remedy for injuries suffered by Plaintiffs in an episode of mob violence resulting from a private conspiracy motivated by an ideological and geographical animus against nonunion workers.

2. Whether the court below erred in holding that animus against persons because of their nonunion associations and beliefs and "outsider" status may constitute "class-based invidiously discriminatory animus" for the purposes of 42 U.S.C. § 1985(3) as interpreted in *Griffin v. Breckenridge*, 403 U.S. 88 (1971).

3. Whether the court below erred in holding that the employer of workers who were the victims of conspiratorial violence may recover for his own injuries suffered as a result of that violence.

DESIGNATION OF CORPORATE RELATIONSHIPS

The A.A. Cross Construction Company, Inc., filing this Brief in Opposition to Petition for Certiorari as Respondent in this proceeding, states that:

1. This is its original designation of corporate relationships.

2. The A.A. Cross Construction Company, Inc. is not owned by any parent corporation.

3. The A.A. Cross Construction Company, Inc. does not have any ownership interest in any subsidiaries.

4. The A.A. Cross Construction Company, Inc. does not have any affiliates.

A.A. CROSS CONSTRUCTION
COMPANY, INC.
Dated: October 26, 1982

THE PARTIES

The Parties to this case are:

Paul E. Scott
James T. Matthews
A.A. Cross
A.A. Cross Construction Company, Inc.
Carpenters, Local 610
Carpenters, Local 753
Pipefitters, Local 195

All other parties to the original proceeding have been dismissed by the court below.

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BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

SUPPLEMENTARY STATEMENT OF THE CASE

This is an action brought under 42 U.S.C. § 1985(3) by two construction workers and their employer for in-

junctive relief and damages against certain unions and some of their leaders. The complaint alleged that Defendants conspired to deprive Plaintiffs of the equal protection of the laws and equal privileges and immunities under the laws, and pursuant to this conspiracy, executed an attack on Plaintiffs causing them injury.

The following additional statement of background facts from the majority opinion more fully indicates the nature of the conspiracy found by the court below:

> Cross Construction Company's hiring practices provoked an antipathetic response from some segments of the Port Arthur community. In fact, on several occasions prior to the eruption of violence on January 17, popular enmity had risen to the level of warnings and threats directed against Cross and its employees. Local residents had confronted Cross employees at a local tavern and pool hall frequented by them, threatening to place pickets at the construction site, promising to make Cross "go union," and occasionally warning of trouble if Cross did not cease hiring nonunion laborers. About three months before the January 17 attack, one of the individual defendants, Bill Moore, approached Mr. Cross and threatened that he would "hurt you bad," saying, "What is going to happen when that big rig of yours down there burns up?" On another occasion, John Wallace, financial secretary and business representative for the Carpenters Local #610, had told Cross that "this is union country" and that if he persisted in using nonunion labor it was "going to cost you a million dollars."
>
> Meanwhile, during the months preceding the January 17 violence, rumors began to develop concerning a "citizens protest" to be staged at the Alligator

> Bayou construction site. These rumors contemplated a public demonstration to call attention to the fact that Cross hired nonunion labor and did not have a labor contract with any union as well as to protest the company's policy of hiring employees from outside the Port Arthur community.
>
> . . . .
>
> On the morning of January 17, after most of the Cross employees had arrived at work, a crowd of nearly three hundred people assembled at the main access road leading to the Cross construction site. . . . The crowd began to get unruly, pushing and shoving the remaining Cross workers as they arrived. Nevertheless, Cross's employees began work as usual. Then, shortly after 7:00 that morning, a group of four pickup trucks, each carrying between twelve and eighteen persons, emerged from the crowd gathered at the access road and drove onto the jobsite. Plaintiff Scott went out to meet the intruders and to request them to leave the area, but one of them approached Scott and said, "Man, you all have got to be crazy . . . this is a union town." Scott told his interlocutor that they did not want any trouble, and he attempted to gather together the other employees and to leave the jobsite. However, before he could complete his mission, someone stepped out of the group and struck him on the head. Suddenly, the mob swarmed over the construction site, brutally beating Cross and his employees with iron rods and wooden boards, overturning and setting fire to the trailer that served as the construction site office, smashing automobile and truck windshields, and vandalizing company tools and equipment.

Scott v. Moore, 680 F.2d 979, 983-84 (5th Cir. 1982); App. A-5

The district court issued temporary and permanent injunctions against further violence and awarded damages to the Plaintiffs. On appeal, both a panel of the court of appeals and, the entire court, on rehearing *en banc*, affirmed the district court judgment with respect to those Defendants who seek this writ of certiorari. (App. E-1).

SUMMARY OF THE ARGUMENT

The decision of the court below is a correct and straightforward application of 42 U.S.C. § 1985(3) and of this Court's decision in *Griffin v. Breckenridge*, 403 U.S. 88 (1971). To the extent that the decision below is inconsistent with *Dombrowski v. Dowling*, 459 F.2d 190 (7th Cir. 1972), *Dowling* is inconsistent with *Griffin*. In any case, the Fifth Circuit's reasoning is consistent with the law in virtually all circuits, including some opinions from the Seventh Circuit. There is no conflict among the circuits with respect to the definition and application of the class-based animus requirement, nor is the Fifth Circuit's opinion in conflict with *Great American Federal Savings & Loan Association v. Novotny*, 442 U.S. 366 (1979). In addition, the Fifth Circuit's resolution of the standing question is dictated by the resolution of this issue in *Griffin* and *Novotny*.

Petitioners have not shown any special or recurring importance to this case or the issues raised therein. The issues raised revolve around the determination of factual matters. *Pullman-Standard v. Swint*, 102 S.Ct. 1781 (1982). Further, a decision by this Court is unnecessary for the guidance of litigants.

REASONS FOR DENYING THE WRIT

I. The Decision Below Correctly Applied 42 U.S.C. §1985(3) to the Facts of This Case And Creates No Conflict Among the Circuits Requiring Resolution By This Court.

A. The Decision Below is a Correct and Straightforward Application of § 1985(3).

Petitioners (Defendants) seek review of the decision below on the basis of alleged conflicts with decisions of other circuits. The Court of Appeals for the Fifth Circuit affirmed the district court, holding that Respondents (Plaintiffs) had established a cause of action under 42 U.S.C. § 1985(3) by proof that Defendants had conspired together for the purpose of depriving persons of the equal protection of the laws and had acted on the basis of that conspiracy, injuring Plaintiffs in their person and property. The finding that the conspiracy was aimed at a denial of equal protection of the laws was supported by the subsidiary factual determination that Petitioners' conspiracy was motivated by a class-based animus against persons having certain beliefs, status and associations. The Fifth Circuit's decision is therefore a straightforward application of the statute as interpreted by this Court in *Griffin v. Breckenridge*, 403 U.S. 88 (1971) to the facts of this case. It presents no issue meriting this Court's review.

In *Griffin* the Court held that 42 U.S.C. § 1985(3) is applicable to purely private conspiracies. *Collins v. Hardyman*, 341 U.S. 651 (1951), which had read an "under color of law" requirement into § 1985(3), making it a virtual dead letter, was to that extent overruled. The Court saw "[l]ittle reason . . . not to accord to the words

of the statute their apparent meaning," and "the words of the statute fully encompass the conduct of private persons." *Griffin*, 403 U.S. at 96. The Court noted that it is easy to be misled by the similarity between the limiting language of § 1985(3), making it applicable only to conspiracies for the purpose of depriving persons of " 'the equal protection of the laws, or of equal privileges and immunities under the laws' "—and the language of the first section of the fourteenth amendment, "which in terms speaks only to the States":

> A century of Fourteenth Amendment adjudication has, in other words, made it understandably difficult to conceive of what might constitute a deprivation of the equal protection of the laws by private persons. Yet there is nothing inherent in the phrase that requires the action working the deprivation to come from the State. Indeed, the failure to mention any such requisite can be viewed as an important indication of congressional intent to speak in § 1985(3) of *all* deprivations of "equal protection of the laws" and "equal privileges and immunities under the laws," whatever their source.

Id. at 97 (citation omitted) (emphasis in original).

Merely because § 1985(3) applies to private conspiracies does not mean, the Court made clear in *Griffin*, that the statute is a "general federal tort law." 403 U.S. at 102. The legislative history of the statute, particularly the addition of the limiting language by an amendment to the original bill, made it clear that Congress intended to reach only conspiratorial action resulting from "the kind of invidiously discriminatory motivation stressed by the sponsors of the limiting amendment." *Id.* Therefore,

the Court concluded that a § 1985(3) cause of action lies only where there is "some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action." *Id.* (footnote omitted).

Tracking the words of the statute, the Court stated the elements of a § 1985(3) cause of action as follows:

> To come within the legislation a complaint must allege that the defendants did (1) "conspire or go in disguise on the highway or on the premises of another" (2) "for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws." It must then assert that one or more of the conspirators (3) did, or caused to be done, "any act in furtherance of the object of [the] conspiracy," whereby another was (4a) "injured in his person or property" or (4b) "deprived of having and exercising any right or privilege of a citizen of the United States."

403 U.S. at 102-03.

The Court found the complaint in *Griffin* sufficient in that it alleged a conspiracy, acts in furtherance thereof, resulting injuries to plaintiffs, and the "requisite animus" showing a purpose to deny equal rights. The animus requirement was supported by allegations that the object of the conspiracy was to deprive plaintiffs of the equal enjoyment of legal rights, including "rights such as free speech, assembly, association, and movement," because of their race. 403 U.S. at 103.

Finally, the Court made clear that the statutory question of the scope of § 1985(3) is distinct from the question of the constitutionality of its application in a par-

ticular case. The statute need not be constitutional in all its possible applications in order to be constitutional in those applications as to which a sufficient source of congressional authority exists. In *Griffin*, finding sufficient congressional authority on the basis of § 2 of the thirteenth amendment and the constitutionally protected right of interstate travel, the Court expressly left open the question of other sources of authority, including § 5 of the fourteenth amendment.

Following *Griffin's* analysis of the elements of a § 1985(3) cause of action, the court below found that Plaintiffs had proved a conspiracy, acts in furtherance thereof, and resulting injuries. As to the second element, the denial of equal rights, the court found that the purpose of the conspiracy was to deny the employee Plaintiffs their protected rights of association and that the requisite class-based animus had been shown. The "conspiracy in this case was motivated by a prounion animus so strong," the court found, "that it staked its claim not merely ideologically, but geographically." 680 F.2d at 992.

The court found in the legislative history of the "Ku Klux Klan Act," the progenitor of § 1985(3), a particular congressional concern for persons discriminated against because of their political associations or beliefs or because of regional hostility. *Id.* at 994. Because "animus directed against nonunion association is closely akin to animus directed against political association," (*ibid.*) and the "nonunion Plaintiffs were repeatedly told that they were in union country and would be punished for choosing to work there nonunion" (*id.* at 992), Plaintiffs were within the intended coverage of

§ 1985(3) on both grounds: "[T]he position of these nonunion employees in Jefferson County, Texas is markedly similar to that of Republicans in the [post-Civil War] South." *Id.* at 994. The court therefore concluded that the nonunion employees in this case are "the kind of persons Congress intended the Ku Klux Klan Act to protect." *Ibid.* Finally, the court found that the application of § 1985(3) to this case is constitutional pursuant to the power of Congress under the Commerce Clause (*id.* at 997), a finding Petitioners do not question (Pet. 15, n.8).

B. There is No Clear and Substantial Conflict Among the Circuit Courts on the Issue of State Action.

Petitioners seek this Court's review of the decision below solely on the ground of asserted conflicts between that decision and decisions of other circuits. Petitioners' principal contention is that the decision below conflicts with the decision of the Seventh Circuit in *Dombrowski v. Dowling*, 459 F.2d 190 (7th Cir. 1972), holding, in Petitioners' words, that "Where a § 1985(3) plaintiff claims interference with a right that has its source in the fourteenth amendment there must be a state involvement of some kind because the fourteenth amendment (unlike the thirteenth amendment and the constitutional right to travel) protects only against state action." Pet. 9-10. *Dowling*, Petitioners assert, represents "not only the majority view but is also entirely sound." Pet. 11. The court below rejected *Dowling's* reinsertion of a state action requirement into § 1985(3), in effect a return to *Collins v. Hardyman*, on the ground that *Dowling*

is plainly inconsistent with "the Supreme Court's express reasoning in *Griffin*." 680 F.2d at 989.[1]

The court below noted that *Griffin* "even considered and rejected the very explanation of section 1985(3)" adopted in *Dowling*. *Id.* at 990. Addressing the argument that private conspirators could only deprive a person of equal protection by interfering with state authorities, *Griffin* noted that § 1985(3) itself contains another clause dealing explicitly with interference with state officials.[2] It is "almost impossible to believe," this Court said, "that Congress intended, in the dissimilar language of the portion of § 1985(3) now before us, simply to duplicate the coverage" of other provisions of the same act. 403 U.S. at 99. If *Griffin* were to be confined to its facts and limited to cases involving violations of thirteenth amendment rights or the right of interstate travel—the effect Petitioners ascribe to *Dowling*—the great pains taken by the Court to ensure that § 1985(3) not become a general federal tort law would have been entirely unnecessary. The *Griffin* Court limited the application of the statute to conspiracies motivated by a "class-based invidiously discriminatory animus" precisely because no limiting state action requirement was perceived to exist. *Dowling* also

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1. The principal dissent below, relied on by Petitioners, also appears to reject the *Dowling* view, arguing that § 1985(3) provides "a remedy for private conduct designed to deny a citizen equal protection of the laws because of his membership in a class that is protected by the fourteenth amendment." 680 F.2d at 1019 n.63. The dissent disagrees, however, with the majority's finding that the employee plaintiffs here belong to such a class.

2. " 'If two or more persons . . . conspire . . . for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws. . . .' " *Griffin*, 403 U.S. at 99 n.7 (citation omitted).

seems contrary to *Griffin* in failing to distinguish the question of the scope of § 1985(3) from the question of its constitutionality in particular applications.

Petitioners are clearly mistaken in their assertion that *Dowling* represents the majority view from which the decision below is a deviation. To the contrary, the Seventh Circuit stands virtually alone in its extremely restrictive view of the meaning of § 1985(3), and even the Seventh Circuit has not been entirely consistent in this view. *Compare Cohen v. Illinois Institute of Technology*, 524 F.2d 818, 829-30 n.33 (7th Cir. 1975), *cert. denied*, 425 U.S. 943 (1976) (§ 1985(3) action may not require state action where first amendment rights are involved) *with Murphy v. Mount Carmel High School*, 543 F.2d 1189 (7th Cir. 1976) (rejecting the *Cohen* view). *See also Dear v. Rathje*, 391 F. Supp. 1, 8 (N.D. Ill. 1975), *aff'd mem.*, 532 F.2d 756 (7th Cir. 1976) and *Franceschina v. Morgan*, 346 F. Supp. 833 (S.D. Ind. 1972) (conspiracies to violate fourteenth amendment rights actionable without state involvement).

Petitioners also erroneously state that the Fourth Circuit is in accord with *Dowling*. To the contrary is *Ward v. Connor*, 657 F.2d 45 (4th Cir. 1981), *cert. denied*, 102 S.Ct. 1253 (1982)—a recent decision cited by the court below but ignored by Petitioners—which distinguished the case relied on by Petitioners. The Fourth Circuit has now squarely adopted the majority view.

Decisions of other courts of appeals holding that § 1985 (3) is applicable in proper circumstances to private conspiracies interfering with rights or interests protected by the fourteenth amendment include the following: Second Circuit: *Weise v. Syracuse University*, 522 F.2d

397 (2d Cir. 1975). Third Circuit: *Richardson v. Miller*, 446 F.2d 1247 (3d Cir. 1971). Sixth Circuit: *Glasson v. City of Louisville*, 518 F.2d 899 (6th Cir. 1975), *cert. denied*, 423 U.S. 930 (1975); *Marlowe v. Fisher Body*, 489 F.2d 1057 (6th Cir. 1973); *Cameron v. Brock*, 473 F.2d 608 (6th Cir. 1973). Eighth Circuit: *Means v. Wilson*, 522 F.2d 833 (8th Cir. 1975), *cert. denied*, 424 U.S. 958 (1976); *Action v. Gannon*, 450 F.2d 1227 (8th Cir. 1971). Ninth Circuit: *Lutcher v. Musician's Union Local 47*, 633 F.2d 880 (9th Cir. 1980); *Life Insurance Co. of North America v. Reichardt*, 591 F.2d 499 (9th Cir. 1979). Tenth Circuit: *Romero v. Union Pacific Railroad*, 615 F.2d 1303 (10th Cir. 1980); *Dry Creek Lodge, Inc. v. United States*, 515 F.2d 926 (1975). The Eleventh Circuit is of course bound by *Scott v. Moore* as an *en banc* opinion of the former Fifth Circuit. *Bonner v. City of Prichard*, 661 F.2d 1206 (11th Cir. 1981).[3]

The decision of the court below represents the majority, as well as the correct, view on the state action issue. Petitioners have not shown a clear and substantial conflict on this issue requiring resolution by this Court.

C. The Circuit Courts Have Been Entirely Consistent in Their Identification of Class-Based Animus.

Petitioners also contend that the decision below conflicts with other court of appeals' decisions as to the criteria for "identifying protected and unprotected classes

3. *But see Rice v. New England College*, 676 F.2d 9 (1st Cir. 1982). In this case, the First Circuit apparently adopted, without discussion, the view espoused by the Seventh Circuit in *Dowling*.

for the purposes of § 1985(3)." Pet. 11.[4] No such conflict exists; all courts appear to agree with the court below that discrimination on the basis of beliefs or associations may constitute "class-based" animus for the purposes of § 1985(3). Far from being divergent (Pet. 11), the decisions consistently interpret the class-based discrimination requirement to mean that the class must share common characteristics or beliefs and that the conspiracy must have been directed against class members because of those characteristics or beliefs, not, *post hoc*, because the members are all victims of Defendants' conduct. *See, e.g.*, the cases cited by the court below, 680 F.2d at 992. *Browder v. Tipton*, 630 F.2d 1149 (6th Cir. 1980) and *Silkwood v. Kerr-McGee Corp.*, 637 F.2d 743 (10th Cir. 1980), *cert. denied*, 454 U.S. 833 (1981), relied on by Petitioners, are not to the contrary, but in fact state and apply the same criteria stated and applied by the court below.

Browder involved a claim by two employees of a freight line company who alleged that they were falsely arrested after crossing a picket line to make a delivery to Cities Service, the picketed company. Plaintiffs claimed to be members of a " 'class comprised of non-Cities Service personnel attempting to carry on business with Cities Service during the course of the strike.' " 630 F.2d at 1151. Having found that the defendants' actions were unrelated to the plaintiffs' beliefs and were only a response to plaintiffs' conduct in crossing the picket line, the Sixth Circuit held on the facts that plaintiffs were not the

4. It is doubtful whether this is even a coherent question under § 1985(3). The requirement for the existence of a "class" refers, not to the plaintiffs, but to the animus of defendants. Thus § 1985(3) does not protect *any* classes, but rather protects "any person" against animus of a certain kind.

victims of a class-based animus within the meaning of *Griffin*. This holding is, of course, in no way inconsistent with the decision of the Fifth Circuit in the present case. Indeed, the Sixth Circuit explicitly recognized that "racial, religious, political or sectional animus" would provide a basis for a § 1985(3) action. *Id.* at 1152. More specifically, "individuals who join together as a class for the purpose of asserting certain fundamental rights" are within the scope of § 1985(3) even though "picket line crossers who are falsely arrested" are not. *Id.* at 1150. The court cited with approval its many decisions upholding § 1985(3) actions involving class-based animus formed on the basis of political associations or beliefs. *Id.* at 1154.

Similarly, as the very language quoted by Petitioners shows (Pet. 12), *Silkwood* is fully in accord with the court below. The *Silkwood* court merely adhered to the uniformly accepted view that a § 1985(3) action requires a showing of "prejudice against a class *qua class*," a "general prejudice which transcends the immediate dispute. . . ." 637 F.2d at 748. The decisions relied on by Petitioners rest, not on any disagreement with the decision below, but on factual findings that class-based animus was not shown in those cases. The court below made the factual finding that class-based animus was shown. That finding, amply supported by evidence in the record, provides no basis for review of the decision by this Court.[5]

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5. Petitioners—and the principal dissent (680 F.2d at 1015)—incorrectly describe the class protected by the decision below as individuals who desire "to work only with the kind of persons they choose to work with." Pet. 9. Plaintiffs did not claim, and the majority below did not hold, that plaintiffs had a constitutionally enforceable right to choose those with whom they will work. The right recognized in the decision below was plaintiffs' right to be free from conspiratorial violence directed against them because of their nonunion status, beliefs, and associations. This right exists whether

Nor is there any basis for Petitioners' contention (Pet. 13) that the decision below conflicts with this Court's decision in *Great American Federal Savings & Loan Association v. Novotny*, 442 U.S. 366 (1979). In *Novotny*, the Court held that a § 1985(3) action cannot be brought to vindicate rights created and defined by Title VII of the Civil Rights Act of 1964 and thereby "avoid most if not all of [the] detailed and specific provisions of the law." 442 U.S. at 375-76. The present case does not involve an attempt to assert rights created by a federal statute while avoiding the limitations imposed by that statute. The court below referred to the National Labor Relations Act, not as the source of the rights being vindicated, but only to show that "congressional concern for those in plaintiffs' class makes their protection by section 1985(3) particularly appropriate." 680 F.2d at 995.

D. The Fifth Circuit's Resolution of the Standing Question is Dictated by *Griffin* and *Novotny*.

Finally, Petitioners seek review of the decision below on the ground of a conflict with *Canlis v. San Joaquin Sheriff's Posse Comitatus*, 641 F.2d 711 (9th Cir. 1981), *cert. denied*, 454 U.S. 967 (1981), on a question of standing to sue. The correctness of the decision of the court below—that a person injured by a conspiracy motivated by class-based animus may sue under § 1985(3) even though not a member of the relevant class—would seem beyond dispute. It is supported not only by the

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plaintiffs are working with others holding similar beliefs, working with union members—in fact, some of Cross' employees were union members (680 F.2d at 983)—meeting in a hall, or walking on the street.

plain language of the statute, but also by this Court's decisions in *Griffin* and *Novotny*.[6]

The plaintiffs in *Griffin* were merely passengers in an automobile owned and operated by the target of the conspiracy, R. G. Grady, who was believed to be a civil rights worker. The Court held that plaintiffs were entitled to recover nonetheless, because "the petitioners—whether or not the nonparty Grady was the main or only target of the conspiracy—allege personal injury resulting from" the acts done in furtherance of the conspiracy. 403 U.S. at 103. Similarly, in *Novotny*, plaintiff was a male who claimed he was discharged from employment because he sought to advance the interests of female employees. Although the suit was based on discriminatory animus against females, the Court did not question plaintiff's standing to sue and presumably recognized that standing by deciding the case on grounds other than this threshold issue.[7]

On this matter, as on the others raised in the petition, Petitioners have not shown a basis for review of the decision below by this Court.

II. The Issues Presented Are Not of Fundamental and Recurring Legal Importance.

Petitioners are correct that 42 U.S.C. § 1985(3) presents important and difficult questions of scope and applicability (Pet. 15), but the basic questions were answered

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6. *Richardson v. Miller*, 446 F.2d 1247 (3d Cir. 1971), and *Novotny v. Great American Federal Savings & Loan Association*, 584 F.2d 1235 (3rd Cir. 1978), *vacated on other grounds*, 442 U.S. 366 (1979), are in accord.

7. There would also appear to be no reason why an employer willing to hire nonunion employees should not be included in the class formed on the basis of nonunion status, associations and beliefs.

by this Court in *Griffin* and need not be reconsidered now. The decision below, as we have shown, merely applies § 1985(3) as interpreted in *Griffin* to the facts of this case, presenting no occasion for this Court's review. Only two additional observations are required.

First, Petitioners complain that the "class-based animus" requirement has led to "a series of seemingly *ad hoc* determinations." In short, Petitioners seek review of the determination that the requisite "class-based invidiously discriminatory animus" existed. Only last term, this Court decided that questions of discriminatory intent are pure questions of fact. *Pullman-Standard v. Swint,* 102 S.Ct. 1781 (1982). Although *Swint* was addressed to § 703(h) of the Civil Rights Act of 1964, its reasoning is equally applicable here. The Court's decision rested on two factors. As a general matter, " 'findings as to the design, motive and intent with which men act' [are] peculiarly factual issues for the trier of fact. . . ." *Id.* at 1790 (quoting *United States v. Yellow Cab Co.*, 338 U.S. 338, 341 (1949)). In addition, the statutory provision at issue in *Swint* required, like 42 U.S.C. § 1985(3), a finding of actual motive: "Discriminatory intent here means actual motive; it is not a legal presumption to be drawn from a factual showing of something less than actual motive." 102 S.Ct. at 1790-91. Since both § 703(h) and § 1985(3) revolve around "the intent with which men act" and require a finding of "actual motive," both are concerned with pure questions of fact.

Since "class-based animus" is a pure question of fact, it becomes clear that Petitioners are demanding review of the factual determinations in the court below in the guise of presenting a legal issue. Petitioners' attempt to displace the district court is evident from their argument,

which requires this Court to decide various questions of fact, such as whether the dispute involved in this case was private or whether it was a matter of general prejudice (Pet. 12-13) and whether or not there was a sufficient factual nexus with matters preempted by federal labor legislation. Clearly these and other matters affecting the existence and nature of the animus must be left to the finders of fact under the standard announced in *Swint*.

It is also clear that the "*ad hoc* determinations" of which Petitioners complain are entirely desirable and appropriate. As previously discussed, the circuit courts of appeals have consistently applied the same legal standards to the determination of class-based animus. However, since class-based animus is a factual matter, the ultimate resolution of the question will depend upon local conditions and the particular facts of each case.

The second and final point to be made with regard to the importance of this case relates to the necessity for a decision at this time. One of the primary functions served by a decision of this Court is to provide guidance to litigants. A decision by this Court ought to inform potential defendants whether contemplated conduct is lawful or not. Such considerations are patently absent from the present case. There is no question but that Petitioners' conduct was unlawful. It has been established as a matter of fact that the Petitioners committed acts of conspiracy, riot, assault, vandalism, and terror. Indeed, in the Fifth Circuit, a plaintiff must necessarily show that a defendant's conduct was independently unlawful in order to bring suit under § 1985(3). *McLellan v. Mississippi Power & Light Co.*, 545 F.2d 919 (5th Cir. 1977). There is, therefore, no need of an authoritative opinion by this Court for the purpose of advising litigants that

their conduct is unlawful, since unlawful action is a precondition to bringing suit. To this extent, review by this Court would not serve a useful purpose.

CONCLUSION

The "conflict and confusion in the courts of appeals," as seen by Petitioners, is, as we have shown, largely a misperception. The decision below is in the mainstream of the law and correct on its facts. It is not a suitable vehicle for review of any pre-existing conflict by this Court.

For the reasons set forth above, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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PROOF OF SERVICE —
CERTIFICATE BY BAR MEMBER

I, Robert Q. Keith, attorney of record for Paul E. Scott, James T. Matthews, A.A. Cross, and A.A. Cross Construction Company, Inc., Respondents herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that, on the ____ day of November, 1982, I served copies of the foregoing Brief in Opposition to Petition for Certiorari on Petitioners hereto, as follows: on the United Brotherhood of Carpenters and Joiners of America, Local 610 (AFL-CIO), United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 195 (AFL-CIO), and the United Brotherhood of Carpenters and Joiners of America, Local 753 (AFL-CIO), Petitioners, by mailing a copy in a duly addressed envelope, registered mail, return receipt requested, to their attorney of record as follows:

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